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Attorneys for Plaintiffs

THE HONORABLE ANNA J. BROWN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PACIFIC RIVERS COUNCIL, COAST RANGE ASSOCIATION, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AUDUBON SOCIETY OF PORTLAND, and NATIVE FISH SOCIETY,

Plaintiffs,

v.

MARVIN BROWN, State Forester, Oregon Department of Forestry, in his official capacity; BRAD WITT, Member of Oregon Board of Forestry, in his official capacity; HOWARD SOHN, Member of Oregon Board of Forestry, in his official capacity; WILLIAM HUTCHISON, Member of Oregon Board

Civ. No. 02-00243-BR

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF of Forestry, in his official capacity; CHRIS HEFFERNAN, Member of Oregon Board of Forestry, in his official capacity; SAM JOHNSON, Member of Oregon Board of Forestry, in his official capacity; LARRY GIUSTINA, Member of Oregon Board of Forestry, in his official capacity; and DIANE SNYDER, Member of Oregon Board of Forestry, in her official capacity,

Defendants,

and

OREGON FOREST INDUSTRIES COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, OREGON SMALL WOODLANDS ASSOCIATION, JOHN CHRISTIE, and TILLAMOOK COUNTY,

Defendant-Intervenors.

INTRODUCTION

1. This citizen suit, brought under the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), seeks to enjoin Marvin Brown, the State Forester of the Oregon Department of Forestry ("ODF"), and the members of the Oregon Board of Forestry from authorizing certain logging operations on private industrial forest lands that cause a "take" of Oregon coast coho salmon, listed as threatened under the ESA, in violation of Sections 4(d) and 9, 16 U.S.C. §§ 1533(d), 1538(a)(1)(B). In particular, the State Forester and the Board have authorized logging operations on private industrial forestlands (5,000 or more acres of timberland in single private ownership) that involve logging sites that present a high risk of landslides and that would affect coho-bearing waters. This case seeks to enjoin the State Forester and the Board from continuing to authorize these logging practices on private industrial forestlands that fall within the range of the

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coho salmon. These forestlands can be found in the Astoria, Tillamook, Forest Grove, Western Oregon, Western Lane, Coos, Douglas, and Southwest Oregon ODF districts.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), over this action, which seeks to enjoin the defendants from further violations of the ESA and its implementing regulations.

3. As required by 16 U.S.C. § 1540(g)(2)(A)(i), plaintiffs provided defendants, as well as the Secretary of Commerce, notice of the violations embodied in this complaint. Plaintiffs originally provided notice by letter dated May 23, 2001, directed to State Forester Marvin Brown's predecessor, James Brown, and the then-current members of the Board of Forestry. Plaintiffs sent an amendment to that notice by letter dated July 12, 2001. On April 17, 2003, Pacific Rivers Council sent a 60-day notice notifying the current members of Board of their potential liability resulting from the adoption of a temporary rule regarding the logging of sites with high landslide hazards. That rule was later made permanent. Pacific Rivers Council sent a subsequent notice dated September 16, 2003, to the State Forester and the members of the Board incorporating the permanent rule and recent legislative changes and expanding the geographic area to the full range of Oregon coast coho salmon. The most recent notice was received by all defendants on or before September 18, 2003.

4. Venue in this district is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391.

PARTIES

5. Pacific Rivers Council ("PRC") is a non-profit conservation organization dedicated to the development and implementation of science-based public policies that protect and restore aquatic ecosystems and the species that depend on them. PRC is incorporated and

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has its headquarters in the State of Oregon. In 1993, PRC led an environmental coalition to petition for federal protection under the ESA of Pacific coho salmon in Oregon, Washington, Northern California and Idaho. For over a decade, PRC has developed substantial scientific, legal, economic, and policy support for ecologically sound forest management standards in the Pacific Northwest. From 1998-2000, a PRC staff member served on a Board of Forestry advisory committee assessing Oregon's forest practices laws and regulations for their effects on Oregon coast coho salmon and other listed fish species. PRC has developed a package of Oregon forest practices reforms that would lessen the harmful impacts of private forest practices on coho salmon. PRC has over 900 members throughout the United States and Canada, including a large contingent of Oregon members. PRC members participate in recreational activities, such as hiking, backpacking, cross-country skiing, nature photography, and river and lake boating throughout Oregon and, where possible, observe and benefit from Oregon coast coho salmon.

6. Coast Range Association is a non-profit organization with over 800 members that is dedicated to protecting the forests of the Oregon Coast Range from unwise use and to fostering new visions of environmental stewardship, long-term sustainability, and biological diversity that include healthy populations of the species, such as coho salmon, that occur naturally throughout the Coast Range. Coast Range Association is incorporated and has its principal place of business in the State of Oregon. Coast Range Association represents individual members who enjoy fishing and other recreation in the Necanicum, Nehalem, Nestucca, Tillamook, Siletz, and Wilson basins and in smaller streams that flow directly into the ocean. Coast Range Association also represents business members and individuals whose livelihoods depend on the tourist industry, which, in turn, depends on healthy forests, watersheds, and salmon runs in Oregon.

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7. Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest organization of commercial fishermen on the west coast. PCFFA is a federation of 24 smaller commercial fishermen's vessel owners' associations, trade associations, port associations, and marketing associations, with member associations in most U.S. ports on the West Coast, including northwestern Oregon. PCFFA also has individual fishermen members "at-large" who are unaffiliated with any particular fishermen's association. Collectively, PCFFA's port and member associations and "at-large" members represent nearly 3,000 west coast commercial fishing families who are small and mid-sized commercial fishing boat owners and operators, many of whom derive all or part of their income from the harvesting of Pacific salmon. PCFFA advocates on behalf of both fishermen and the fisheries resources to ensure the long-term survival of commercial fishing as a way of life. Much of this work involves efforts to protect and restore coho and other salmon from threats, such as those posed by degradation of salmon habitat from Oregon forestry practices. Many of PCFFA's members are fishermen whose livelihoods depend upon fish as a natural resource and who, until recent salmon fishery closures, generated hundreds of millions of dollars in personal income to the region from the harvest of Pacific salmon.

8. Audubon Society of Portland is a non-profit conservation organization established in 1902 to promote the enjoyment, understanding, and protection of native birds, other wildlife, and their habitats in the Pacific Northwest. Audubon Society of Portland is incorporated and has its principal place of business in the State of Oregon. Audubon Society of Portland has been involved in science-based advocacy to protect habitat and species on a statewide and local level, including through the development of the Tillamook and Clatsop State Forest Management Plans. Audubon Society of Portland is actively involved in efforts to protect ecologically

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sensitive areas located in the Tillamook and Clatsop State Forests, as well as private forest lands from logging, encroaching development, and other degrading land use. Audubon Society of Portland currently has approximately 10,500 members, many of whom who use Oregon's coastal forests and streams for a wide variety of recreational purposes, including wildlife viewing and fishing.

9. The Native Fish Society is a non-profit organization, incorporated and based in Oregon, which advocates for the conservation, protection, and restoration of native fish in the northwest, including coho salmon. The mission of the 350-member organization is to advocate scientifically sound conservation, protection, and recovery actions for native fish and their habitats, including where those habitats have been degraded by forestry practices, and to monitor and influence public agency management decisions in favor of native fish. The Native Fish Society inventories and monitors the status and health of native fish populations and disseminates educational materials on native fish conservation through scientific reports, newsletters, action alerts, and the media. Members of the Native Fish Society engage in recreational and vocational activities to observe and benefit from native fish, including Oregon coho salmon, in their native streams.

10. Defendant Brown is the State Forester in Oregon. Under the Oregon Forest Practices Act and the forest practice regulations promulgated by the Oregon Board of Forestry, the State Forester administers the forest practice regulations adopted by the Board of Forestry. The State Forester is charged with reviewing and commenting on written plans submitted for logging operations on private lands. The State Forester is also the official secretary to the Board of Forestry. Defendant Brown is sued in his official capacity.

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11. Defendant members of the Oregon Board of Forestry supervise all matters of forest policy within Oregon and adopt forest practice rules authorizing and regulating logging operations on private lands. The members of the Board of Forestry are sued in their official capacities.

BACKGROUND

I. HARMFUL LOGGING PRACTICES CONTRIBUTED TO THE DECLINE AND ESA LISTING OF OREGON COAST COHO SALMON.

12. Oregon coast coho salmon populations have declined precipitously over the past several decades. Habitat degradation due to forestry has been a major factor in the decline. In proposing to list Oregon coast coho salmon as threatened under the ESA, the National Marine Fisheries Service ("NMFS") found that:

> Logging activities, and the associated road networks, often result in soil erosion and stream sedimentation such that spawning habitat is seriously degraded.

60 Fed. Reg. 38,011, 38,024 (July 25, 1995). NMFS reiterated these findings in subsequent documents pertaining to the listing of coho salmon. See 62 Fed. Reg. 24,588, 24,592-93 (May 6, 1997).

13. Based on this decline, NMFS proposed to list Oregon coast coho salmon as threatened under the ESA, 60 Fed. Reg. at 38,011, and NMFS eventually adopted a final rule listing Oregon coast coho salmon as threatened. 63 Fed. Reg. 42,587 (Aug. 10, 1998).

14. In promulgating protective regulations under ESA Section 4(d) imposing the take prohibition to protect coho and other salmonids, NMFS reiterated that coho and other salmon "are at risk of extinction primarily because their populations have been reduced by human 'take,'" and identified "past and ongoing destruction of freshwater and estuarine habitats" as key factors precipitating the decline. 65 Fed. Reg. 42,422 (July 10, 2000). In conjunction with its Section 4(d) salmon protection rules, NMFS issued take guidance identifying the types of

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activities "most likely to cause harm and thus violate this rule." Id. at 42,472. Among the activities that run a "high risk of resulting in take" are various logging activities. Id. at 42,472-73. NMFS had previously identified logging in areas susceptible to mass wasting and surface erosion as an activity that may cause a take. 64 Fed. Reg. 60,727, 60,730 (Nov. 8, 1999). Mass wasting is generally defined as the downslope transport of rock, soil, or sediment under the influence of gravity.

II. THE OREGON PLAN FAILED TO STOP LOGGING OPERATIONS THAT TAKE COHO SALMON.

15. As part of the listing process, NMFS assessed the inadequacy of existing regulatory mechanisms, as required under ESA, 16 U.S.C. § 1553(a)(1)(D). NMFS found Oregon's regulation of private forest practices to be inadequate, stating that:

> [T]he OFPA [Oregon Forest Practices Act] does not adequately consider and manage timber harvest and road construction on sensitive, unstable slopes subject to mass wasting, nor does it address cumulative effects.

62 Fed. Reg. at 24,596.

16. In an attempt to avoid an ESA listing of Oregon coast coho salmon, Oregon Governor John Kitzhaber developed the Oregon Coastal Salmon Restoration Initiative ("OCSRI"). In April 1997, the Governor entered into a Memorandum of Agreement ("MOA") between Oregon and NMFS, which stated that "NMFS will work with Oregon and the Department of Forestry over the next six months to develop adjustments NMFS believes are required in Oregon forest practices to provide a high probability of protecting and restoring aquatic habitat on Oregon forest lands which are important for Oregon coastal coho." MOA, § 7(f)(1). The MOA further provided that "Oregon shall make every effort to ensure that the Board of Forestry, or the Legislature consider the proposals promptly, and make a decision on

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the proposed changes in a timely manner and shall make any necessary changes no later than June 1, 1999." MOA, § 7(f)(3).

17. In May 1997, NMFS withdrew its proposal to list Oregon coast coho salmon as threatened, concluding that the species would not become endangered during a two-year time frame allowed for Oregon to adopt improved habitat measures. 62 Fed. Reg. at 24,607-08. While NMFS expressly found that the current forest practice rules do not "adequately protect coho salmon habitat," id. at 24,596, it relied on Oregon's promise to adopt new rules that would provide such protection:

> Under the April 1997 MOA between NMFS and the Governor of Oregon . . ., NMFS will propose to Oregon additional forest practices modifications necessary to provide adequate habitat conditions for coho. If these or other comparable protections are not adopted within 2 years, NMFS will act promptly to change the ESA status of this ESU to whatever extent may be warranted.

Id. at 24,607-08.

18. In accordance with the MOA, NMFS recommended changes to Oregon's regulation of forest practices in February 1998. NMFS, A Draft Proposal Concerning Oregon Forest Practices at 67 (Feb. 17, 1998). Specifically, NMFS recommended prohibiting forest practices on landslide-prone locations with a high or medium potential for delivery to streams. Id. at 54. Oregon did not implement NMFS's proposal, or any comparable proposal, at that time or at any time since.

19. On June 1, 1998, this Court held that NMFS adhered to an erroneous legal standard and acted contrary to the evidence in deciding not to list Oregon coast coho salmon as threatened. Oregon Natural Resources Council v. Daley, 6 F. Supp.2d 1139 (D. Or. 1998). Because Oregon's current habitat protections were inadequate, and the OCSRI established a voluntary system lacking guarantees that adequate protections would be implemented, the Court

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concluded that "[t]here is simply no rational basis for the NMFS to assume that Oregon will adopt any, much less adequate, habitat measures." Id. at 1159.

20. NMFS filed an appeal of this decision, but subsequently withdrew its appeal and listed Oregon coast coho salmon as threatened in 1998. 63 Fed. Reg. 42,587 (Aug. 10, 1998).

III. SINCE THE COHO SALMON LISTING, THE STATE FORESTER AND BOARD OF FORESTRY HAVE FAILED TO PREVENT THE TAKE OF COHO SALMON FROM LOGGING ON PRIVATE INDUSTRIAL LANDS.

21. In January 1999 after the coho salmon listing, Governor Kitzhaber issued Executive Order No. 99-01 modifying the framework for implementing what had become known as the Oregon Plan for Salmon and Watersheds in light of the coho listing.

22. The Executive Order directed the Board of Forestry to "determine, with the assistance of an advisory committee, to what extent changes to forest practices are needed to meet state water quality standards and to protect and restore salmonids." Executive Order No. 99-01, at 3(c). More specifically, the Executive Order directed that: "the advisory committee will make recommendations to the Board at both site and watershed scales on threats to salmonid habitat relating to sediment, water temperature, freshwater habitat needs, roads and fish passage. Based on the advisory committee's recommendations and other scientific information, the Board will make every effort to make its determinations by June 1999." Id.

23. The Board convened the Forest Practices Advisory Committee on Salmon and Watersheds ("FPAC") to recommend changes in ODF's regulation of forest practices. The FPAC committee did not reach consensus, but a majority made modest recommendations to improve some aspects of forest practices on private lands in Oregon. These recommendations did not purport to stop the State Forester from authorizing logging operations that take coho salmon. The FPAC's final report candidly admits that: "[t]he effort did not attempt to specifically address sufficiency for particular federal laws or regulations, such as the federal

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Endangered Species Act or Clean Water Act." Report of the Ad Hoc FPAC on Salmon & Watersheds to the Oregon Board of Forestry at 2 (Aug. 2000).

24. To date, the Board of Forestry has made only some of the modest regulatory changes recommended by the FPAC committee majority. The current Oregon forest practice regulations still authorize logging operations that degrade salmon habitat and harm coho salmon in multiple ways. In February 2001, NMFS joined two other federal agencies in finding that: "The evidence is, however, overwhelming that forest practices on private lands in Oregon contribute to widespread stream temperature problems and degraded salmonid habitat conditions" and that a "substantial body of scientific literature demonstrat[es] that Oregon forest practices likely adversely affect water quality and threatened species of salmonids . . . ." Letter to Oregon Department of Environmental Quality and Department of Forestry from NMFS, Environmental Protection Agency, & Fish & Wildlife Service (Feb. 28, 2001).

25. Commenting on Oregon's coastal nonpoint pollution program in January 2003, NMFS, along with the Environmental Protection Agency ("EPA"), concluded that "very little progress has been made in addressing water quality problems associated with landslide prone areas, riparian protection, and cumulative effects[.]" NMFS and EPA also stated that "the preponderance of scientific evidence and expert opinion show that implementation of additional measures is needed to meet water quality standards." Letter to Oregon Department of Land Conservation and Development and Department of Environmental Quality from NMFS & EPA (Jan. 10, 2003).

26. In August 2003, EPA again concluded that "additional management measures are needed to strengthen Oregon's forest practices with respect to several areas critical to water

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quality protection," including "harvest in high risk, landslide prone areas[.]" Letter to Oregon Department of Environmental Quality from EPA (Aug. 20, 2003).

27. The neighboring states of Washington and California have modified their forest practice regulations and logging operation approvals in an attempt to meet the requirements of the ESA. While those reforms are not stringent enough to provide a reasonable certainty that take of listed salmonids will be prevented or to ensure the survival and recovery of listed salmonids, they provide greater salmon protection than the Oregon forest practice regulations in Oregon.

IV. THE EVOLUTION OF OREGON'S REGULATORY AND STATUTORY SCHEME FOR AUTHORIZING COMMERCIAL LOGGING OPERATIONS.

A. The General Regulatory Framework

28. The Oregon Forest Practices Act (or "OFPA") is intended to ensure that logging on private lands is "consistent with sound management of soil, air, water, fish and wildlife resources . . . and to ensure the continuous benefits of those resources for future generations of Oregonians." ORS 527.630(1).

29. To achieve this statutory objective, the Act delegates: (1) to the Board of Forestry the authority to promulgate forest practice regulations that provide for the "overall maintenance" of air, water, soil, fish, and wildlife resources and that protect resource sites used by threatened and endangered species, ORS 527.630(3), 527.710(1)-(3); and (2) to the State Forester the obligation to review and comment on private logging operations that threaten to harm these resources. ORS 527.670(2)-(3), (6)-(12).

30. The Board of Forestry is vested with exclusive authority to develop and enforce statewide and regional rules to protect fisheries, water resources, and resource sites. ORS 527.630(3). The Board of Forestry is charged with adopting forest practice regulations to ensure

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sound management of, inter alia, soil, water, and fish resources. ORS 527.710(1). The Board's rules must provide for the overall maintenance of, inter alia, water resources, soil productivity, and fish and wildlife. ORS 527.710(2). The Board must also adopt rules to protect resource sites, including habitat for species listed under the federal ESA. ORS 527.710(3). The Board's obligation to provide for the "overall maintenance" of fish and wildlife and to protect resource sites requires protection of federally listed species from activities that constitute a violation of the federal ESA.

31. The Board's forest practice regulations establish standards for logging and other forest practices on private lands.

32. The Board has adopted forest practice regulations establishing standards for logging landslide-prone areas. OAR 629-623-0000 et seq.; see also OAR 629-630-0000 et seq. (harvesting rules). The Board has adopted some regulations to protect resource sites for federally listed threatened species, but has adopted no such rule with respect to threatened Oregon coast coho salmon, despite the mandates of ORS 527.710(3). See OAR 629-665-0000 et seq.; OAR 629-605-0180 & 629-605-0190. The Board has adopted regulations prescribing buffer areas and leave tree requirements for streamside areas along fish-bearing streams. OAR 629-640-0000 et seq.

33. The OFPA and forest practice regulations establish a notification, review, and comment scheme. At least 15 days before beginning most commercial logging operations on private land, a landowner, timber owner, and/or operator must provide notice to the State Forester. ORS 527.670(6); OAR 629-605-0150(1)-(2). Forest practices involving clearcut logging activities are subject to this notification requirement. OAR 629-605-0140(1).

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34. Under the OFPA and the Board's forest practice regulations, landowners, timber owners, and/or operators are required to submit written plans for State Forester review and comment for certain operations, including operations within 100 feet of fish-use streams or within 300 feet of resource sites. ORS 527.670(3)(a)(A)-(B); OAR 629-605-0170(1); OAR 629-635-0130. A written plan must describe how the operation will be conducted, including riparian protection measures. OAR 629-605-0170(6).

35. Landowners, timber owners, and/or operators must comply with the Oregon forest practice rules. OAR 629-605-0100(1).

B. The Prior Regime

36. Previously, when PRC initially filed this lawsuit, the OFPA required the State Forester to review and approve logging operations on private lands for certain operations near fish-bearing streams, near resource sites, or that result in certain types of extensive logging. ORS 527.670(3); ORS 527.670(3)(a)(A)-(C); OAR 629-605-0170.

37. The Board's forest practice rules also required landowners, timber owners, and/or operators to submit written plans and obtain prior approval from the State Forester for logging on high-risk sites, which were defined as lands having a significant potential for destructive mass soil movement. OAR 629-630-0500; OAR 629-600-0100(27) & (28).

38. The State Forester was required to wait 14 calendar days before approving written plans that were required to be submitted under the OFPA because of logging in close proximity to a fish stream or resource site. ORS 527.670(10). If the State Forester did not act within five working days after the 14-day waiting period, the written plan was deemed approved and the operation could begin. ORS 527.670(11). The waiting period did not apply to written plans required only by regulation, such as logging high-risk sites. Adversely affected parties could appeal approvals of written plans to the Board – subject to standing and financial conditions – if

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the approval was required by the OFPA, but not if the approval was required by regulation, as was the case for logging high-risk sites. ORS 527.700; ORS 527.670(3). Affected parties could seek judicial review of the Board's appeal decision.

39. Landowners, timber owners, and/or operators had to comply with approved written plans. OAR 629-605-0170(5); OAR 629-635-0130(5).

C. The Court's Denial of Motions to Dismiss

40. On December 23, 2002, this Court denied defendant State Forester and defendant-intervenors' motions to dismiss. The motions asserted, inter alia, that the State Forester's authorization of private logging activities could not result in liability under the ESA. The Court rejected the claim, holding that "[b]y its plain terms, this [the ESA take] prohibition extends to governmental entities . . . ." Opinion and Order at 26. The Court indicated that the State Forester may be liable for take when his authorization is a prerequisite to the logging operations and the operation, as approved by the State Forester, is likely to result in the take of threatened salmon.

D. Regulatory Changes Made in Response to the Court's Finding of Potential Liability for the State Forester

41. On January 27, 2003, the Board of Forestry adopted a temporary rule that modified the State Forester's role in reviewing and authorizing logging on high-risk sites.

42. The temporary rule eliminated the regulatory requirement for obtaining the State Forester's prior approval of logging on high-risk sites, unless such approval is otherwise required by statute for logging in close proximity to fish-use streams or resource sites, or unless the logging implicates public safety concerns as set out in ORS 527.710(11) and the Board's implementing regulations. OAR 629-630-0500(2). The Board specified that the temporary rule made only procedural changes and no substantive changes to forest practice standards. The

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Board specified that the substantive regulatory standards governing logging on high-risk sites remained unchanged. Id.

43. On June 4, 2003, the Board voted to make the temporary rule permanent. The stated rationale for both rules' adoption was to insulate the State Forester from liability in the present litigation.

44. The Board's forest practice regulations, as amended by the temporary and permanent rules, grant blanket authorization for logging high-risk sites when the logging does not implicate public safety concerns as set out in ORS 527.710(11) and the Board's implementing regulations.

E. Statutory Changes Made in Response to the Court's Finding of Potential Liability for the State Forester

45. On August 29, 2003, Governor Kulongoski signed House Bill 3264 into law, amending Oregon's FPA. The new law removes the requirement for a written plan for clearcut logging in excess of 120 acres. The OFPA, as amended, eliminates State Forester approval of a written plan for logging operations near fish-bearing streams or resource sites, although notification and submission of a written plan is still required for such logging operations. Instead of approvals, the State Forester must review and comment on written plans for such logging operations. Adversely affected persons may seek a hearing by the Board of Forestry, and the Board may affirm, modify, or rescind the comments. ORS 527.670(10)-(11). The amendment to the OFPA made no changes in the substantive standards governing logging operations on private lands. Instead, it eliminated the intermediary role played by the State Forester in authorizing logging practices pursuant to Board regulations. The Board's forest practice regulations now provide a blanket authorization for the practices at issue in this case.

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V. THE STATE FORESTER AND BOARD OF FORESTRY AUTHORIZE LOGGING OPERATIONS IN LANDSLIDE-PRONE AREAS THAT SIGNIFICANTLY DEGRADE COHO SALMON HABITAT.

46. The Oregon forest practice rules define a "high landslide hazard location" as a specific site that is subject to initiation of a shallow, rapidly moving landslide. OAR 629-600-0100(31). The State Forester shares with timber operators the responsibility to identify high landslide hazard locations. OAR 629-630-0500(2).

47. Under the Board's forest practice rules, the following criteria are to be used in identifying high landslide hazard locations: "(a) The presence, as measured on site, of any slope in western Oregon (excluding competent rock outcrops) steeper than 80 percent, except in the Tyee Core Area, where it is any slope steeper than 75 percent; or (b) The presence, as measured on site, of any headwall or draw in western Oregon steeper than 70 percent, except in the Tyee Core Area, where it is any headwall or draw steeper than 65 percent." OAR 629-623-0100(3). In addition, field identification of atypical conditions may be used to develop site-specific slope steepness thresholds for any part of the state where the hazard is "equivalent" to the conditions noted above. Id.

48. In the past, the State Forester often failed to identify landslide-prone areas that met the regulatory definition of a high-risk site. For example, in March 2001, the State Forester approved logging along Cook Creek in the Columbia City unit. The logging operation included logging on landforms that met the regulatory definition of "high-risk site," but the State Forester failed to identify these areas as high-risk sites. Because the State Forester failed to identify the high-risk sites, he did not impose the standard mitigation – primarily the restriction of soil gouging and the requirement of log suspension – required in logging high-risk sites.

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49. The high landslide hazard locations identified in the forest practice rules and applied by the State Forester present a high risk for landslides. Clearcut logging on such high landslide hazard locations significantly increases the occurrence of landslides.

50. In the past, the State Forester typically required only minimal mitigation for logging on high-risk sites that focused on the yarding and hauling of the cut timber and did not prohibit the logging itself. No other mitigation was required unless the logging implicated public safety concerns as set out in ORS 527.710(11) and the Board's implementing regulations. The current forest practice regulations prohibit deep or extensive ground disturbance, skid roads, and ground-based equipment. OAR 629-630-0500(4)-(6).

51. Under the prior forest practice regulations, the State Forester had a practice of denying approval of a written plan to log on a high-risk site only if the operation posed a significant risk to human life because a landslide from the logging would reach a residence, public building, or highway. Senate Bill 12; ODF Forest Practices Technical Note Number 2 (Effective Oct. 18, 2000); OAR 629-623-0000 et seq. The State Forester regularly approved logging on high-risk sites when the landslides that could result would affect coho salmon and their habitat, but not public safety.

52. For example, in March 2000, the State Forester approved an operation in the Tillamook district adjacent to Moon Creek, which is in a watershed designated as a key watershed for aquatic conservation under the Northwest Forest Plan. A federal watershed analysis indicated that Moon Creek has "a high potential for debris slides and debris flows" and that it was one of two creeks that "had a preponderance of the identifiable landslides in the analysis area." In keeping with the State Forester's routine practice, he approved logging operations that would clearcut log on high-risk sites near Moon Creek.

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53. To obtain approval for the Moon Creek logging, the landowner removed from the written plan a proposed clearcut on one high-risk site because an ensuing landslide could potentially cause damage to a farmhouse below. In contrast, the State Forester granted approval for logging on other high-risk sites where the ensuing landslide would affect a coho salmon stream, rather than a building. For mitigation, the State Forester required only that "one end of the log will be suspended and the soil will not be gouged more than one foot deep, vertical measure."

54. Pursuant to current forest practice regulations, the State Forester continues to have a duty to determine if there is "public safety exposure" from shallow, rapidly moving landslides emanating from high landslide hazard locations. OAR 629-630-0500(3).

55. The State Forester has a responsibility to "verify information provided by operators" and determine the degree to which public safety could be compromised by logging high landslide hazard locations. OAR 629-623-0200 ("Exposure Categories"); 629-623-0300 ("Public Safety Risk Levels"). Operators must submit a written plan for all logging operations with "intermediate" or "substantial" downslope public safety risk, and the State Forester must approve the plan before operations may begin. OAR 629-623-0700(1); 629-630-0500(2).

56. As under the previous forest practice regulations, the State Forester reviews written plans submitted by a timber owner, landowner, or operator and determines whether high landslide hazard locations are present. If there is a significant public safety risk, the Forester must approve the operation before it may proceed. If, however, a high landslide hazard location presents a likelihood of harm to coho salmon, but not public safety as defined in the rule, the Board of Forestry's blanket authorization of logging will allow the operation to go forward.

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57. The clearcut logging authorized by the Board of Forestry and the State Forester on high landslide hazard locations significantly increases the incidence of landslides.

58. When high landslide hazard locations fail, the consequences for the landscape and stream systems can be quite severe. Landslides from hillslopes adjacent to streams deliver sediment directly to the stream. In the immediate impact area, sediment can bury, entomb, or suffocate salmon and/or their eggs. The high landslide hazard location landforms identified in the Oregon forest practice rules often generate shallow rapid landslides and/or debris flows when they fail. Debris flows tend to scour the upper reaches of the stream network often to bedrock, physically removing fish habitat in the scoured area. Debris flows can remove trees that stand in their path, eliminating sources of large wood and shade. Debris flows remove wood from in the streams, which reduces sediment storage capacity. As debris flows move down the stream system, they leave a legacy of persistent sedimentation in the lower reaches of the stream network. The sedimentation causes channels to widen and become shallower, leading to elevated temperatures. High concentrations of fine sedimentation adversely affect coho salmon at every stage of their life cycle, reducing spawning success, impairing feeding activities, and disrupting respiration by abrading gill tissues. Debris flow deposits can also create physical barriers to fish migration. In these and other ways, landslides, including debris flows, triggered by logging on high landslide hazard locations harm coho salmon and degrade coho salmon habitat.

CAUSE OF ACTION

59. The ESA prohibits any person from "taking" a threatened or endangered species and from attempting to commit or soliciting another to commit such an act. 16 U.S.C. §§ 1538(a)(1)(B), 1538(g). The ESA defines "take" as "to harass, harm, pursue, hunt, shoot,

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wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 3(19), 16 U.S.C. § 1532(19). By regulation, NMFS has defined "harm" to include:

> significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102. "Harassment" includes unintentional acts that make it more difficult for an endangered species to breed, feed, shelter, reproduce or raise its offspring. H.R. Rep. No. 412, 93d Cong., 1st Sess. at 11 (1973); 50 C.F.R. § 17.3.

60. Under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), NMFS has the authority to issue regulations extending the take prohibition to threatened species. NMFS has adopted a regulation pursuant to Section 4(d) making the take prohibition applicable to Oregon coho salmon. 65 Fed. Reg. 42,422 (July 10, 2000). Under Section 9(a)(1)(G), it is unlawful to take threatened salmonids in violation of this 4(d) regulation. The 4(d) regulation became effective for Oregon coast coho salmon as of January 8, 2001, and, except for a period from September 12, 2001 to December 14, 2001, it has continued to prohibit take of Oregon coast coho salmon.

61. The ESA take prohibition applies to all "persons." 16 U.S.C. § 1538(a)(1). The Act defines a "person" to include any "officer, employee, agent, department, or instrumentality of the Federal Government, of any State," or of local governments. 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment. Id. § 1540(g)(1). Defendants are "persons" subject to the ESA take prohibition and subject to suit under the ESA citizen suit provision.

62. The Board of Forestry has adopted forest practice regulations authorizing and regulating logging in landslide-prone areas. The regulations define "high hazard landslide

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locations." The regulations require the State Forester to identify such locations and to determine the degree to which public safety could be compromised by logging high landslide hazard locations. The Board's regulations prohibit logging for public safety reasons as set out in ORS 527.710(11) and the Board's implementing regulations. Where public safety concerns are not implicated, the regulations authorize logging in landslide-prone areas subject to only minimal mitigation to prevent excessive ground disturbance. The regulations specify the mitigation requirements that apply. Landowners, timber owners, and/or operators must comply with the Oregon forest practice rules. OAR 629-605-0100(1).

63. The Board of Forestry's blanket authorization is a proximate cause of the clearcut logging activities on private industrial forestlands at issue in this case.

64. Clearcut logging on high landslide hazard locations causes landslides that severely degrade aquatic habitat and adversely affect coho salmon. Landslides significantly degrade aquatic habitat by increasing sedimentation and changing stream structure. Where the effects of landslides reach streams occupied or used by listed coho salmon, they significantly disrupt and impair essential behavioral patterns, such as spawning, rearing, feeding, and sheltering. Injuries to and mortalities of listed coho salmon are reasonably certain to result.

65. By authorizing clearcut logging on high landslide hazard locations where the effects of the ensuing landslides would reach coho salmon habitat, the Board of Forestry has authorized logging operations in specifically the manner that is reasonably certain to cause to cause a take. Forest practice regulations promulgated by the Board require minimal mitigation concerning the yarding and hauling activities, but do not prohibit the logging. The authorization of clearcut logging on high landslide hazard locations is reasonably certain to harm and harass listed coho salmon.

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66. The defendants' authorization of clearcut logging on high landslide hazard locations where the ensuing landslides would significantly degrade listed coho salmon habitat or otherwise adversely affect coho salmon violates the salmon 4(d) rule, 50 C.F.R. § 223.203(a) and 65 Fed. Reg. 42,422 (July 10, 2000); ESA, 16 U.S.C. § 1538(a)(1)(G), which makes it unlawful to violate a 4(d) regulation; and ESA, 16 U.S.C. § 1538(a)(1)(B) & (g), the ESA take prohibition made applicable to Oregon coast coho salmon in the 4(d) regulation.

67. Unless enjoined, the defendants will continue to authorize clearcut logging on high landslide hazard locations where the ensuing landslides will significantly degrade listed coho salmon habitat and result in a take in violation of 50 C.F.R. § 223.203(a); 65 Fed. Reg. 42,422 (July 10, 2000); 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1538(a)(1)(G); and 16 U.S.C. § 1538(g).

REQUEST FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

1. Declare that the defendants have violated the salmon 4(d) rule, 50 C.F.R. § 223.203(a) and 65 Fed. Reg. 42,422 (July 10, 2000); ESA, 16 U.S.C. § 1538(a)(1)(G), which makes it unlawful to violate a 4(d) regulation; and ESA, 16 U.S.C. § 1538(a)(1)(B) & (g), the ESA take prohibition made applicable to Oregon coast coho salmon in the 4(d) regulation, by authorizing clearcut logging operations on high landslide hazard locations where the effects of the ensuing landslides would reach coho salmon habitat;

2. Enjoin the defendants from continuing to authorize private industrial logging operations in watersheds with coho salmon in the Astoria, Tillamook, Forest Grove, Western Oregon, Western Lane, Coos, Douglas, and Southwest Oregon ODF districts that log on high landslide hazard locations where the effects of the ensuing landslides would reach coho salmon habitat in violation of the ESA;

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3. Award plaintiffs their costs and attorneys' fees in this action pursuant to the ESA, 16 U.S.C. § 1540(g)(4); and

4. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 19th day of November, 2003.

/s/ Patti Goldman
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On November 19, 2003, I served a true and correct copy of the following documents on the parties listed below:

1. First Amended Complaint for Declaratory and Injunctive Relief

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of November, 2003, at Seattle, Washington.

/s/ Catherine Hamborg
Catherine Hamborg

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